STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDY JOYCE FELISIAK,

Defendant-Appellant.

UNPUBLISHED
September 25, 2007

No. 271541
Macomb Circuit Court
LC No. 2005-005181-FH

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted of assaulting, resisting, or obstructing a police officer, MCL 750.81d. She was sentenced to one-and-one-half years' probation, with the first 21 days to be served in jail. Defendant appeals as of right. We affirm.

Defendant first argues that she was denied the effective assistance of counsel due to her counsel's joint representation of her and four codefendants. Defendant specifically points to an exchange that occurred during counsel's cross-examination of Officer Anthony Roeske. Officer Eric Leroux had testified that defendant jumped on the back of Officer John Melcher. Roeske testified that he did not remember defendant being involved in the altercation and that it was codefendant Lisa Marie Young who had been in the altercation with Melcher. Counsel asked Roeske whether he remembered testifying at the preliminary examination that defendant had jumped on Melcher's back. Defendant takes issue with this questioning and claims that it evidences a conflict of interest.

Defendant did not object below to the joint representation. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Generally, where a timely objection is made to multiple representation based on a conflict of interest, and the trial court "fails to inquire as to whether the conflict warrants the appointment of separate counsel, prejudice is presumed and reversal is automatic." *Harris v Carter*, 337 F3d 758, 761-762 (CA 6, 2003). Furthermore, where a trial court "'knows or reasonably should know that a particular conflict exists,'" the trial court has a duty to initiate an inquiry. *Harris*, *supra* at 762, quoting *Cuyler v Sullivan*, 446 US 335, 347; 110 S Ct 1708; 64 L Ed 2d 333 (1980)); see also *People v Rhinehart*, 149 Mich App 172, 177; 385 NW2d 640 (1986). However, a "vague, unspecified possibility of a conflict, such as that which inheres in almost every

instance of multiple representation," does not invoke the trial court's duty. *Gillard v Mitchell*, 445 F3d 883, 892 (CA 6, 2006) (internal citations and quotation marks omitted). Where no objection was made at the trial court, and the trial court did not know or have reason to know of a particular conflict, prejudice is presumed if the defendant demonstrates that an actual conflict of interest adversely affected the performance of defendant's attorney. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). We conclude that this is the standard that defendant must meet in the instant case.

A defendant establishes an actual conflict of interest by showing that her counsel "'actively represented conflicting interests.'" *Robinson v Stegall*, 343 F Supp 2d 626, 634 (ED Mich, 2004), quoting *Cuyler*, *supra* at 350. The defendant must establish that the adequacy of her counsel's performance was adversely affected. *Robinson*, *supra* at 634. The defendant must demonstrate that her counsel "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Id*., quoting *Thomas v Foltz*, 818 F2d 476, 481 (CA 6, 1987).

"[T]he standard . . . requires a choice by counsel, caused by the conflict of interest." *McFarland v Yukins*, 356 F3d 688, 706 (CA 6, 2004). "[B]oth taking an action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse affect." *Mickens v Taylor*, 240 F3d 348, 360 (CA 4, 2001), aff'd 535 US 162 (2002). A party need not demonstrate that the conflict was outcome-determinative. *Robinson*, *supra* at 634. Rather, prejudice is presumed if a defendant establishes an actual conflict of interest that adversely affected her counsel's performance. *Smith*, *supra* at 557.

Defendant has not demonstrated an actual conflict of interest that adversely affected her counsel's performance. Read in context, defense counsel's elicitation of Roeske's testimony was favorable both to defendant and to Young. Roeske's trial testimony was that he did not remember seeing defendant at all and that he misidentified her in his preliminary examination testimony. Roeske testified that he did not remember testifying at the preliminary examination that defendant jumped on Officer John Melcher's back. He went on to state that he did not remember seeing defendant *or* Young jump on Melcher's back. In light of the testimony, we conclude that defendant has failed to show an actual conflict of interest and adverse performance related to the questioning of Roeske.

Moreover, we reject defendant's suggestion that the trial court's failure to adhere to MCR 6.005(F) requires reversal. See *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). We also reject defendant's argument that, in general, defense counsel provided her with inadequate representation "because her defense was tied to the same defenses of the other co-defendants even though her involvement was significantly different." Defendant takes issue with the fact that counsel focused more on the codefendants than on her. However, counsel's strategy was to argue that the police were overly aggressive with all the defendants and overacted to the situation. Defendant benefited from this argument. Moreover, it was a reasonable strategy to place a greater emphasis on the others, given the possibility that the jurors would recognize the arguable insignificance of defendant's behavior as compared to the others' behavior. Defendant has simply not met her burden of establishing an actual conflict of interest that adversely affected her attorney's performance.

Defendant next raises the unpreserved argument that she did not receive a fair trial due to prosecutorial misconduct. This Court reviews unpreserved claims for plain error that affected the defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is inappropriate for unpreserved claims unless a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are decided case by case, and the prosecutor's remarks are evaluated in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not make comments that are not supported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

During the prosecutor's rebuttal to defendant's closing argument, she stated:

> And I'm going to suggest to you that the defendant, after this bad situation and that you see [codefendant Nicole Brandy Niedzwiecki] with her mouth shut, because it was wired, and you see Wendy Felisiak, I'm going to suggest to you that they started seeing dollar signs to make this try and seem better and that they're gambling on the fact that you will give them the benefit of the doubt and find them not guilty.

Defendant argues that the prosecutor's remark was improper because it was not supported by the evidence.

However, we note that a prosecutor is allowed to comment on inferences that may arise from the evidence and from "common experience." *People v Ackerman*, 257 Mich App 434, 450; 619 818 (2003). Evidence was presented that defendant made a police report that she was injured by an assault by a police officer. Additionally, defendant testified that the idea of suing the police department "was brought to [her] attention," and she gave the additional vague information that she "was not concerned with it." She further stated that suing had "never really been considered." The challenged remark by the prosecutor was not a statement of fact, but, rather, was speculation regarding the possible motives of defendant and Niedzwiecki and was based on reasonable inferences and common experience. The prosecutor began her remark by stating, "I suggest to you that defendant . . . ," implying that the remarks to follow were speculation and not based on fact. It would be reasonable to infer, based on the evidence and on the common knowledge that sometimes people sue their alleged assailants, that defendant might bring a civil action against the government. The prosecutor did not commit misconduct. Moreover, even if we *were* to conclude that the challenged remarks were improper, we would still find no basis for reversal, given the brief nature of the comments and given the court's instructions that the lawyers comments were not evidence and that the jurors should only consider the evidence. Under those circumstances, no plain error requiring reversal would have been apparent. See, generally, *Carines*, *supra* at 763-764 (delineating the plain error standard).

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter